86-429

Supreme Court, U.S.
FILED
AUG 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term 1986

JOHNNY J. DOTSON

and

DANIEL FINN BLOCH

Petitioners - Plaintiffs

v.

MOUNTAIN MISSION SCHOOL, INC., et al.,

Respondents - Defendants

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Daniel Finn Bloch

Petitioner pro se

110 Pearl Avenue

Sarasota, Florida 34243

813-355-4551

QUESTIONS PRESENTED FOR REVIEW

1. After 15 years, has a landmark 42 U.S.C. s. 1985(2)(3) case finally appeared which will enable the Supreme Court to identify and affirm there is a class which meets the requirements of a non-racial, class-based, invidiously discriminatory animus, pursuant to the unanimous Supreme Court decision in Griffen v. Breckenridge, 403 U.S 88, 29 L Ed 2d 338, 91 S Ct 1790 (1971)?

2. Do overt acts of a conspiracy over a period of years connect the conspirators?

3. Is Virginia statute 63.1-218 repugnant to the Fourteenth Amendment to the United States Constitution and therefore unconstitutional?

LIST OF ALL PARTIES

Johnny J. Dotson and Daniel Finn Bloch,

Plaintiffs

Mountain Mission School, Inc., Charles Sublett, James Marvin Swiney, Mrs. James M. Swiney, Berniece Sublett, Paul Platt, Mabel Abbott, Jim Stanley, Minnie Grannert, Dr. Thomas McDonald, Dr. J. P. Sutherland, Fred Short, Herman Wells, Clarence Greenleaf, Mrs. Sylvia Raines, Mrs. B. D. Phillips, Bud Degaffrillo, Keary Bob Williams, Donald A. McGlothlin, Nicholas E. Persin, Pleasant C. Shields, J. Marshall Coleman, Louie L. Wainwright, Rosemary Griscom, Paul H. Coleman, David Schwertfager, Donna Jean Gallion, Sharon Mullett, Robert Beck, Asa and Wanda Mellor, Gary and Ruth Oyler, Linda and Charles Lambert, Griffin Bell, William Webster, Edward Sawyer, Birg Sergent, Willard Osborne, Roger Makely, Ottmar Gallion, Richard L. Gibson,

Defendants

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OFFICIAL OPINIONS

The opinions and memoranda of law of the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Western District of Virginia are listed in the appendix. The Court of Appeals for the Fourth Circuit affirmed the District Court's opinion that animus against orphans is motivated by

their economic status and that petitioners are not members of a class protected by s. 1985; and that there is no connection between many overt acts over the years which manifest an on-going conspiracy to cover up child abuse. The lower courts held that there appeared to be no allegations which did not require the appellants to be members of a protected class.

DATE OF JUDGMENT

Appellants' appeal was submitted March 5, 1986 and decided May 2, 1986. The petition for re-hearing was denied June 5, 1986.

JURISDICTION

The Supreme Court has jurisdiction of this case pursuant to 28 U.S.C. s. 1254(1) since petitioners appeal from the final order of the U.S. Court of Appeals for the Fourth Circuit.

ARTICLE XIV of the CONSTITUTION

Citizenship Rights Not to be Abridged

1. All persons born or naturalized in the United States, and subject to the juris-

diction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The United States District Court for the Western District of Virginia, the court of first instance, had jurisdiction pursuant to Title 28, U.S.C. s. 1343 and 42 U.S.C. s. 1985.

STATEMENT OF THE CASE

Petitioners essentially allege that Mountain Mission School officials and their supporters have conspired to inflict severe physical and sexual abuse on children of a class of persons whom society generally considers to be "white

trash". There is a universally-held class-based animus against this ilk which is invidious and discriminatory. The public is disgusted by this class. The orphaned children who are members of this class, through no fault of their own, have corroborated the physical and sexual abuse with shocking affidavits by the dozen. Petitioner Bloch has uncovered the abuses and attempted to stop them. The respondents have, in turn, further conspired to stop Bloch and keep abuse and neglect at the school hidden. The school officials have admitted many of petitioners' allegations after first lying and denying them. Four lawsuits against the school are now pending in federal courts in Virginia and Ohio which allege massive sexual molestation, the commitment of innocent children to mental institutions for tattling, conspiracy to murder, the bloody beating of children and other horrors.

ARGUMENT

I.

Petitioner Dotson is a member of a class against which there is a widespread, invidious, discriminatory animus as strong or stronger that that applied to blacks. The animus exists against that class of badly motivated, badly educated persons whom most people label as the dregs of society. Incest, whoring, retardation, stealing, lying, refusing to work, and having too many, often illegitimate children they have no intention of raising are traits which are ascribed to members of this class. The general animus against this class of people who wantonly conceive children is undeniable. They are often termed "trash".

The orphaned children of this class are readily identifiable. They easily meet the s. 1985(2)(3) requirement of animus. They are put in institutions because nobody wants them. Society traditionally has a

wide-spread, pervasive, invidiously discriminatory animus against this class at least equal to that against blacks.

Lacking healthy habits, adequate nutrition, sanitation and medical care, not a few of these biological parents die young and leave their children as a burden on society. The deceased Dotson father died a bootlegger when Johnny Dotson was a baby. His biological mother was convicted of a felony. The animus against this class often results in the neglect, sadism, psychological abuse, abrogation of legal rights and sexual molestation that crops up repeatedly and traditionally in institutions that warehouse this class of orphaned children.

The Supreme Court unanimously affirmed in Griffen v. Breckenridge, 403 US 88, 29 L Ed2d 338, 91 S Ct 1790 (1971) that 42 U.S.C. s. 1985(3) protects members of a class against whom an invidiously discriminatory animus exists. In United Brother-

hood of Carpenters v. Scott, 463 US 825, 77 L Ed2d 1049, 103 S Ct 3352 (1983) the Supreme Court split 5-4, the majority holding that the animus must be general in nature, widely pervasive and closely akin to the widespread animosity against blacks. The non-union workers who were attacked by union workers in the Carpenters case came very close (4-5) to meeting the requirements of section 1985(3) because there was a conspiracy and resultant injury to persons and property. The thrust of the conspiracy was economic, however, and the Court majority held that members of the would-be class did not have discrete, insular and immutable characteristics. Savina v. Gebhart, D.C. MD 497 F. Supp 65 (1980). Nor were they a traditionally disadvantaged group. Orshan v. Anker, DC NY 489 F Supp 820 (1980)). Nor were they members of a class who have no responsibility for their situation. Wagar v. Hasenkrug, D.C. Mont. 486 F Supp 47

(1980). Nor were the members of the class historically victims of discrimination. Banghart v. Sun Oil Co., DC PA 542 F Supp 451 (1982).

Discrimination against the class involved in this case even extends to the Virginia legislature, which passed an otherwise unexplainable statute. The Court of Appeals held Virginia statute 63.1-218 to be constitutional in a crabbed reading of its words. The Court did not certify to the State Attorney General that the constitutionality of the statute was drawn in question. The statute appears below.

> 63.1-218. None of the provisions of this chapter shall apply to any private school or charitable institution incorporated under the laws of this state, which is located west of Sandy Ridge and on the watersheds of Big Sandy River, and to which no contributions are made by the State or any agency thereof.
>
> 63.1-215. Any person who operates a child welfare agency without first obtaining a license...shall be punished by a fine of not more than $100 or by imprisonment for not more than 12 months... Each day's violation... shall constitute a separate offense.

63.1-218, which abrogates 63.1-215, was solely designed to permit respondents to do as they pleased with members of the class, without fear of retribution. The statute reflects the pervasive state animus against the class.

Orphans are a class of persons who are historically and traditionally victimized because of their special vulnerability. Respondent Swiney regularly reminded the children their families were "white trash" and that they would end up bums, drunks and prostitutes like their parents. This was very damaging psychological abuse. He had their heads shaved bare for running away after being sexually molested. He forced the small children to work on a rock-pile for 30 days like convicts. One cannot conceive of a disadvantaged group or class of persons, black or white, who better fit the landmark description of a class of persons against whom there is such a widespread, pervasive, invidiously

discriminatory animus.

All the tests which define the class are met:

a. Orphans are immutably so. Their biological parents cannot be resurrected from their graves.

b. Orphans belong to a traditionally disadvantaged group. There is no advantage to being an orphan.

c. Orphans have no responsibility for their situation.

d. Orphans are historically victims of discrimination.

e. The animus is so great the state denied members of the class of their constitutional rights, and discriminated against the class.

f. The class has discrete and insular characteristics. They come from destroyed homes and have to be institutionalized because they are unwanted.

The class members suffered frequent sexual molestation, yet none of them have been able to get criminal charges filed against their abusers because of the animus against the class. Authorities have simply ignored their complaints because of the pervasive, invidious, discriminatory animus against the class. With so many

complaints from any other class there would be immediate arrests and indictments for sexually molesting the children. Petitioners rebut the lower courts' holding that the only animus against orphans is economic. The animus is against trashy families.

It is axiomatic in society as well as physics that when there is a vacuum, someone or something rushes in to fill it. When especially vulnerable orphans have no one, not even the state, to check on their welfare, it is inevitable that sadistic, sexually perverted persons will be attracted to supervise them. The class-based animus offers an excuse to the sadistic to abuse the children, both physically and psychologically. The legal, scholastic and geographical isolation help to make these orphans safe targets for sexual molestation. Because of the severe, widespread animus against the class, no amount of corroborating witnesses from

their class-mates has sufficed to obtain criminal indictments. Would any prominent parent who sent his child to prep school tolerate having him forced to work for 30 days on a rock-pile, or have his head shaved bald to embarrass him, for running away under the circumstances? The double standard of justice is obvious. It illustrates the class-based animus clearly.

The animus against blacks is no more widespread and pervasive than that which exists against this class. The animus is easy to explain. The public is disgusted by that class of persons who wantonly conceive children and make them a burden on society. The children are not responsible, however, and the class should be protected by s. 1985(2)(3), just as blacks are.

II.

Petitioners allege respondents conspired with one another to intimidate the children from "tattling", to cover up the sadistic acts, physical abuse, psycholog-

ical trauma and sexual molestation of orphaned members of the class whom respondents institutionalized over many decades. Examples supported by affidavits are:

a. In 1965 Paul Scott was raped by respondent McDonald, the staff physician. When Scott complained, he was beaten & told to remain silent. His mail was intercepted. His sister was sent to a mental institution for reporting the sexual molestation.

b. In 1975 respondents Sublett & Persin conspired together & threatened petitioner Dotson with reform school if he testified against the school in pending federal suits.

c. In 1980 Edith Justus testified under oath she was sent by respondent Sublett to shoot petitioner Bloch to stop him from taking petitioner Dotson to testify in federal court.

d. In 1984 plaintiff Harold Sykes was threatened with jail by respondent Swiney if Sykes testified in federal court against respondents.

e. In 1986 respondents got Edith Justus, a convicted felon, to sign an affidavit impeaching her prior testimony.

f. In 1986 respondent Sublett admitted petitioner Dotson was beaten bloody, & that he was isolated after he testified against the respondents.

g. Respondent Persin threatened to jail petitioner Bloch if he testified in federal court against respondents.

Much of the intimidation was specifically designed to prevent truthful testimony in federal courts and reaches the requirements of the first part of 42 U.S.C. s. 1985(2).

It is well settled that in a conspiracy, each conspirator is responsible for all the acts done in furtherance of the conspiracy. U.S. v. Andrews, 585 F 2d 961 (1975).

Once a conspiracy has been clearly established, slight evidence may be sufficient to connect a defendant to it. U.S. v. Knight, 416 F 2d 1181.

It is for the jury to decide whether a defendant had a part in the conspiracy. U.S. v. Kelly, 329 F 2d 314 (1975).

It is well settled that if reasonable people might conclude that a conspiracy existed, the court should allow the jury to decide the case on its merits. U.S. v.

Kelly, supra.

The Ohio welfare department also alleged conspiracy in its suit against respondent school, when Sublett refused to release Ohio's wards. He cannot claim that petitioners are alone in alleging conspiracy to cover up child abuse, which included the Ohio wards.

It is not necessary that the participation of the accused should be shown by direct evidence, but connection may be inferred from such facts as legitimately tend to sustain the inference. U.S. v. Manton, 107 F 2d 834.

A conspiracy continues to run until the latest overt act of the conspiracy, at which time the statute of limitations begins to run. Molinas v. National Basketball Association, 190 F Supp 241 (1961).

The lower court ignored many over acts over the years which connect the conspirators. Responsibility extends to the

last overt act for all its members. Since petitioners and their witnesses were intimidated from testifying freely, fully and truthfully in United States courts, they do not need to belong to a class at all to have standing to sue pursuant to the first part of s. 1985(2). The Supreme Court made this clear in Kush v. Rutledge, 103 S Ct 1483, 74 L Ed 2d 413, 385 F 2d 414 (1983).

The lower courts did not even mention that respondent Persin, a state judge, had no authority whatsoever over petitioner Dotson, who was not on probation and was not charged with any crime. Yet Persin openly threatened, at Sublett's direction, to send Dotson to reform school if he testified against respondent school in federal court in pending suits. The state judge acted in clear absence of all jurisdiction and is not entitled to judicial immunity.

Petitioners' affidavits must be construed to be true for purposes of juris-

diction. The matter is in controversy, and reasonable people could conclude that a conspiracy exists. It does not matter if the court believes the allegations or not. It is up to the jury to decide the case on its merits. U.S. v. Kelly, supra.

III.

Virginia welfare workers were the only persons authorized by law to conduct investigations of child abuse during the years that petitioner Dotson attended respondent school. They were unable to investigate because Virginia statute 63.1-218 exempts respondent school from inspection and licensing. It is the only school in Virginia which is exempt. During the years in question welfare workers were afraid of losing their jobs if they set foot on the property of respondent school. Can this be equal protection under the law? Operators of any other child-care institution in Virginia would be subject to fines and jail for each day's violation of

the welfare statutes. Petitioners allege that the 63.1-218 statute is unconstitutional because it deprived them of equal protection of the law, as is guaranteed by the Fourteenth Amendment to the United States Constitution. (In this case, petitioners were deprived of the state welfare inspection they had requested which protects children in every other institution in Virginia.)

Ohio authorities were equally unable to obtain Virginia welfare investigation of the criminal charges because 63.1-218 prevented it. The charges could not be confirmed. Now that the former residents are adults. they have been told their charges are "too old" and criminal prosecution would be too difficult, even though there is no statute of limitations for felonies in Virginia. Thus the abusers go unpunished and free from prosecution. Because pettitioners' privileges as citizens were abridged by preventing them from pursuing

criminal indictments of their abusers, and because the statute denied them the equal protection of the laws, Virginia statute 63.1-218 is clearly unconstitutional.

States' immunity may be set aside in order to enforce the Fourteenth Amendment. Hutto v. Finney, 437 US 678, 57 L Ed2d 522, 98 S Ct 2565. State officials are stripped of immunity when they violate a person's constitutional rights. Fitzpatrick v. Bitzer, 427 US 445, 96 S Ct 2666, 49 L Ed2d 614 (1976). Therefore petitioners have the right to sue the state respondents.

IV.

Quite aside from the question of the constitutionality of the 63.1-218 law, the lower courts never gave petitioners the opportunity to show that respondent school did not comply with the provisions of the statute as written. Because respondent school accepted contributions such as vaccine from state agencies, it should not

be exempt from the welfare laws. The children were therefore illegally deprived of welfare investigation whether 63.1-218 is constitutional or not! The cavalier law violation by authorities is clearly another example of animus against the class. The repeated injuries the children suffered for years at the hands of the respondents would have been minimized had adequate licensing and inspection been forthcoming, as it should have been, and would have been to any other class.

V.

Much study by the Supreme Court of Congress' original intent has revealed there was no unanimity by the lawmakers. Some wanted the statute to include many more groups than others. The view of no faction reigned supreme. The law as written and passed was obviously a compromise amongst the various factions that prepared and voted on it. Therefore its meaning should be taken at its face value.

Respondents conspired to injure petitioner Bloch for taking two children to testify in court about the abuses they were suffering, much of which respondents have since admitted. It is clearly error for the lower courts to hold that the only animus against orphans is economic, and to dismiss the case on that ground.

CONCLUSION

Petitioner Dotson is a member of a class protected by 42 U.S.C. s. 1985(2)(3). Petitioners also have standing to sue pursuant to the first part of s. 1985(2) because respondents conspired to intimidate petitioners' witnesses from testifying freely, fully and truthfully in United States courts. Petitioners also have a right to sue because their constitutional rights were violated by an unconstitutional statute, injuring petitioners as a result. They have alleged a long-standing conspiracy by respondents and supported their allegations with many

corroborating affidavits from other victims that prove that respondents exercised sadism and sexual molestation and then covered it up with threats and intimidation over a period of many years.

Both the district court and the court of appeals vacated their previous opinions and reversed themselves several times on these issues. The issue of what non-racial classes should be protected by s. 1985 has been alluded to but never clarified by the Supreme Court. There is great need nationally for this to be done.

Wherefore petitioners respectfully ask the Supreme Court to grant this petition for a writ of certiorari and rule on the landmark questions presented.

Respectfully submitted,

Daniel Finn Bloch
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813-355-4551

CERTIFICATE OF SERVICE

I certify that 40 copies of the foregoing petition, with its appendix attached, were mailed at the United States Post Office in Bradenton, Florida on August 18, 1986 to the Office of the Clerk, Supreme Court of the United States, 1 First St., Washington, D.C. 20543; and that 3 copies of the foregoing petition, with its appendix attached, were mailed at the same time and place to all counsel of record on August 18, 1986: E. K. Street, P.O. Box 2100, Grundy, Virginia 24614; Linwood T. Wells, Jr., 101 N. 8th St., Richmond, Virginia 23219; Birg Sergent, P.O. Box 426, Pennington Gap, VA 24277; E. Montgomery Tucker, P.O. Box 1709, Roanoke, VA 24008; James P. Jones, P.O. Box 2009, Bristol, VA 24203; Mr. & Mrs. Charles R. Lambert, 104 River Rd., Ellwood City, PA 16117; Edward Sawyer, P.O. Box 630306, Ojus, FL 33163; Robert B. Hines, 101 S. Washington Avenue, Millersburg, OH 44654;

Gene W. Holliker, 30th Floor, 30 E. Broad St., Columbus, OH 43215; Roger Makley, IBM Building, Dayton, OH 45401.

Daniel F. Bloch
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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85 - 2009

Daniel F. Bloch, Appellant

and

Johnny J. Dotson, Plaintiff

vs.

The Mountain Mission School; Charles Sublett, President; James Marvin Swiney, Vice President; Mrs. James Swiney, Secretary; Bernice Sublett, Treasurer; Paul M. Platt, teacher; Mabel Abbott, teacher; Jim Stanley, teacher; Minnie Grannert, teacher; Dr. Thomas McDonald; Dr. J. P. Sutherland, Fred Short, Herman T. Wells, Rev. Clarence Greenleaf, Mrs. Sylvia Raines, Mrs. B. D. Phillips, Bud Degaffrillo, Keary Bob Williams, Donad A. McGlothlin, Pleasant C. Shields, J. Marshall Coleman, Louie C. Wainwright, Rosemary Griscom, Paul H. Coleman, David M. Schwertfager, Donna Jean Gallion, Mrs. Sharon Mullett, Robert Beck, Asa Mellor, Wanda Mellor, Gary Oyler, Ruth Oyler, Charles R. Lambert, Mrs. Lynda Lam-

bert, Griffin Bell, William Webster, Edward C. Sawyer, Birg Sergent, Willard Osborne, Roger J. Makley, Ottmar Gallion, Richard L. Gibson, and Nick E. Persin,

Appellees

Appeal from the United States District Court for the Western District of Virginia at Big Stone Gap. Glen M. Williams, District Judge. (C/A No. 79-0125-B).

Submitted March 5 1986. Decided May 2, 1986.

Before RUSSELL and CHAPMAN, Circuit Judges and BUTZNER, Senior Circuit Judge.

(Daniel F. Bloch, Appellant pro se. Linwood T. Wells, Jr., Assistant Attorney General for Appellee Persin; E. K. Street, Street, Street & Street, for Appellees Sublett and Mountain Mission School; E. Montgomery Tucker, United States Attorney, for Appellee Makley; James P. Jones for Appellee McDonald; Edward Sawyer, Birg Sergent and Charles Lambert, Appellees.)

PER CURIAM:

Daniel F. Bloch appeals from the judgment of the district court entered against him on his claims brought under 42 U.S.C. s. 1985(2)(3). In 1979, Bloch filed suit against the Mountain Mission School, an orphanage located in Grundy, Virginia, and forty-two individuals, including officials of the United States, Virginia, Ohio and Florida. Bloch essentially claimed that Mountain Mission School officials had subjected children at the school to abuse and neglect; that Bloch had attempted to uncover and stop these abuses; and that school officials had, in turn, engaged in a conspiracy to stop Bloch and keep abuse and neglect at the school hidden.

After the district court found that Bloch had failed to state a constitutional claim against any of the defendants, Bloch appealed to this court. On appeal, we held Bloch should be afforded the opportunity to develop a claim under both halves of s.

1985(2) and under s. 1985(3). We remanded the case for this purpose and otherwise affirmed the judgment of the district court. Dotson v. Mountain Mission School, No. 79-1771 (4th Cir., Oct. 18, 1982) (unpublished). After affording Bloch this opportunity on remand, the district court entered judgment for the defendants. Bloch again appealed.

The first half of s. 1985(2) prohibits two or more persons from conspiring to deter, by force, intimidation or threat, any party or witness from testifying truthfully in a federal court. In our earlier opinion in this case, we held that a racial or class-based animus is not an essential element for a violation of the first half of s. 1985(2). Dotson, supra, slip op. at 13-14. The validity of this holding has since been confirmed by the Supreme Court's decision in Kush v. Rutledge, 460 U.S. 719 (1983).

The second half of s. 1985(2) prohibits

two or more persons from conspiring for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any state with the intent to deny to any citizen the equal protection of the laws. This section does require a racial or class-based animus. See Kush, supra. In Dotson, supra, slip op. at 14-17, we held that Bloch's allegation that the conspiracy was motivated in part by animus against orphans satisfied this requirement.

Section 1985(3) prohibits two or more persons from conspiring for the purpose of depriving, either directly or indirectly, any person or class of persons from the equal protection of the laws. This section also requires a racial or class-based animus, which, in Dotson, supra, we held was satisfied by the allegation of animus against orphans.

I

ALLEGATIONS UNDER FIRST HALF OF S. 1985(2)

On remand, Bloch attempted to show that Nicholas Persin, a state judge, and Charles Sublett, then president of the Mountain Mission School, conspired to prevent him from testifying in a suit to be brought in federal court in Ohio against the school by some of its former students. Judge Persin had presided over Bloch's 1975 conviction and sentencing for the kidnapping of two children from the school. Upon Bloch's plea of guilty and the recommendation of the Commonwealth Attorney, Judge Persin had sentenced Bloch to confinement for ten years, that sentence be suspended upon condition that Bloch serve six months and that he be of good behavior and not violate the laws of the Commonwealth for ten years; and that he obtain psychiatric examinations by a competent psychiatrist and furnish the court with copies of his psychiatric reports at least three times a year until no longer required by the Court; and that

he not interfere with the operation of the Mountain Mission School in any way, shape or form; and more specifically that he not contact, directly or indirectly, any of the children in the school.

In 1977 Bloch and two former students of the Mountain Mission School contacted an Ohio attorney, Thomas Callaghan, to explore the possibility of a suit against the school, to be brought by the two former students. Callaghan contemplated filing a civil rights suit in federal district court in Ohio. Through his conversations with Bloch, Callaghan learned that Bloch was on probation and that as part of his probation he was to stay in his home county and not become involved with the Mountain Mission School. Callaghan became concerned that if Bloch were to testify in Ohio or be involved in a Mountain Mission suit that conceivably it could be a technical violation of his probation. Due to this concern, Callaghan called Judge

Persin and explained to him that he was contemplating filing a lawsuit on behalf of certain residents of the Mountain Mission School against the school and that he understood that Bloch, whom he intended to call as a witness, was on probation out of Judge Persin's court. Callaghan asked Judge Persin whether there would be any problem under the circumstances if Bloch were to testify. According to Callaghan, Judge Persin became very angry and informed him that if Bloch had anything to do with the Mountain Mission School, legally or otherwise in a lawsuit or outside of his home county, Persin would make sure that Bloch's probation was revoked. Shortly after this conversation, Callaghan decided not to proceed with the civil rights suit. As reasons for not going forward, Callaghan cited the lack of totally cooperative support of the children involved, Judge Persin's intransigence on the probation order and Bloch's prior plea

to the abduction charge.

The district court found that Bloch's conclusory allegations of a conspiracy between Persin and Sublett were insufficient to create a genuine issue of material fact on the existence of a conspiracy to prevent Bloch from testifying in federal court. We agree. See Stolnick v. Staviskey, 560 F.2d 31 (1st Cir. 1977), cert denied, 434 U.S. 1077 (1978).

Bloch's only evidence of a conspiracy between Persin and Sublett rests on the statements of Johnny Dotson, a former Mountain Mission student. According to Dotson, Sublett took him to Judge Persin's chambers in May of 1975, where Dotson was threatened with reform school if he testified in suits then pending in federal courts in Roanoke and Abingdon. These suits had been initiated by the Ohio Welfare Department and the Children's Legal Defense Fund to remove custody of certain students then in the school, and Bloch was

not a party to either suit. As Bloch had no connection, either as a witness or a party, with the alleged interference, he cannot base his claim upon it. Moreover, the alleged incident is too remote from the conversation regarding Bloch's 1977 plans to testify in a contemplated suit to give rise to an inference that Sublett conspired, at that time, to have Judge Persin discourage Bloch from testifying.

The district court also denied a motion filed by Bloch in July 1985 for leave to file a supplemental pleading. Bloch sought to add a claim that James Swiney, the current president of Mountain Mission School, had attempted to intimidate Harold Sykes from testifying for Bloch in the instant litigation. According to Bloch, Sykes, a former Mountain Mission student, became so infuriated when the district court quashed Sykes' scheduled deposition, that he took it upon himself to "get even" for the abuses he suffered at the school by

assaulting one of his former teachers. Swiney threatened to have Sykes jailed for the assault but promised that he would not bring charges if Sykes promised not to submit an affidavit or testify for Bloch in this litigation. In support of his motion to supplement his complaint, Bloch submitted an affidavit in which Sykes stated that "on or about Oct. 15, 1984, James M. Swiney tried to intimidate me from telling the truth in Federal Court about what happened to me as a boy at the Mountain Mission School as part of a conspiracy to cover up child abuse there."

In denying Bloch leave to supplement his complaint, the district court found that the proposed amendment came over six years after the suit had been filed and at a time when depositions had been taken and the case submitted to the court for ruling. The court noted that the ruling, if granted, would cause additional delay while a new defendant was served and

answered the suit and while new evidence was taken in regard to his involvement.

The decision to allow or deny the filing of a supplemental complaint is committed to the discretion of the district court. Fed. R. Civ. P. 15(d). We find no abuse of that discretion in this case. At the time that Bloch filed his motion, the only issue remaining before the district court was whether Persin and Sublett conspired in 1977 to prevent Bloch from testifying in federal court in violation of the first half of s. 1985(2). Although Bloch's new claim also implicated the first half of s. 1985(2), it involved a different defendant, a different lawsuit and a different witness, and offered little to suggest that the new defendant conspired with Sublett or Persin to prevent that witness from testifying.

The district court also found that Judge Persin was immune from liability under the Supreme Court's holding in Stump

v. Sparkman, 435 U.S. 349 (1978). Bloch argues that this finding contradicts our earlier opinion in this case. In that opinion we stated:

> If the allegations against Persin, a state judge, are taken to be true,-- if he informed counsel for residents of the Mountain Mission School who wished to file suit that, if Bloch testified in that proceeding, he would imprison Bloch - we think that this defendant acted in clear absence of all jurisdiction, so that judicial immunity would not apply.

Dotson, supra, slip. op at 19. This statement was based on the bare allegations of Bloch's complaint. Although the nature of Bloch's allegations prevented an assumption that immunity would apply, we agree that the additional facts developed on remand justified a finding of immunity.

In Stump, the Supreme Court reaffirmed the broad scope of the grant of judicial immunity. "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in

excess of his authority; rather, he will be subject to liability only when he acted in clear absence of all authority." Stump, supra, at 356-57 (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1872). Noting that this broad grant of immunity applies only to judicial acts, the Supreme Court in Stump established a two factor test for determining whether an act is a judicial one. The first factor relates to "the nature of the act itself, i.e., whether it is a function normally performed by a judge," Stump, supra, at 362; and the second factor involves "the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.: Id.

In advising Callaghan that Bloch's participation in the contemplated lawsuit would lead to the revocation of his probation, Judge Persin at the most abused his discretion or exceeded his jurisdiction; he did not act in complete absence of all

jurisdiction. As recognized by the district court, Virginia affords its judges extensive authority over those they place on probation. Under Va. Code s. 19.2-306, Judge Persin had the power to revoke the suspension of sentence and cause Bloch to be arrested and brought before the court for any cause deemed by Persin sufficient.

We also find Judge Persin's expression of opinion that Bloch's participation in the contemplated lawsuit would provide cause for revocation to be a judicial act. Callaghan contacted Judge Persin because of judicial power Persin exercised over probation. Callaghan sought an opinion whether the planned activity would be a violation of the terms of the probation and if so, whether the violation would be excused. In seeking an exercise of judicial discretion, Callaghan dealt with Persin in Persin's judicial capacity. Moreover, as Judge Persin's response in-

volved the exercise of judicial discretion, his act was judicial in nature. Although the questions before Judge Persin were presented through a telephone call to his chambers rather than in open court, the questions related to matters within his discretion under Va. Code s. 19.2-306. Particularly in matters involving the conduct of probationers, we do not think that a judge need wait until an act has been done before indicating an opinion whether the act constitutes a violation of probation. A judge's advance expression of opinion whether a particular act is a violation of probation, and if so, whether it is excusable, does not subvert, and may enhance, the judicial supervision over probationers provided for in Va. Code s. 19.2-306. Although Judge Persin might have made a more informed decision had more formal procedures been used, the informality was essentially at Bloch's choosing, and it

did not change the judicial nature of Judge Persin's expression of opinion.

II

ALLEGATIONS UNDER SECOND HALF OF s. 1985(2) and UNDER s. 1985(3)

The district court entered judgment for the defendants under the second half of s. 1985(2) and under s. 1985(3) on the basis that Bloch's allegations that the conspiracy was motivated by animus against orphans failed to satisfy the requirements of those sections that there be racial or class-based animus. Again, Bloch maintains that the district court's holding is contrary to our decision in Dotson, supra. In remanding this action to the district court on Bloch's prior appeal, we stated:

> Since Griffen [v. Breckenridge, 403 U.S. 88 (1971)] the Supreme Court has not faced the question of what classes are protected by the portions of s. 1985 that require class-based animus, and the decisions of the lower courts are impossible to reconcile, see cases cited in Scott. v. Moore, 640 F.2d 708, 718-24 (5th Cir. 1981). We think, however, that orphans are far more analagous to members of racial minorities than are members of a political party, whom Sen. Edmunds would have included,

> or members of other groups that have been included by the courts, see, e.g., Scott v. Moore, supra, (non-union workers).

Dotson, supra, slip op. at 15.

The district court's present holding is, indeed, inconsistent with our prior decision. We find, nevertheless, that the district court's conclusion is proper in light of the Supreme Court's decision in United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. 825, (1983), rendered after our opinion in Dotson.

In Scott, the Supreme Court reversed the Fifth Circuit's holding, cited in Dotson, supra, that animus against non-union workers satisfies the class-based animus requirement of s. 1985(3). The Fifth Circuit had reasoned that because Republicans had been among the objects of the Ku Klux Klan's conspiratorial activities, political groups were to be protected by s. 1985(3). The Fifth Circuit had further reasoned that because animus against an economic group such as those

who preferred nonunion association was closely akin to the animus against political association, the section prohibited a conspiracy against nonunion workers. Scott v. Moore, 680 F.2d 979, 992-94, (5th Cir. 1982 (en banc), reversed sub nom. United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. 825 (1983). In reversing the Fifth Circuit, the Supreme Court first expressed an unwillingness to hold that s. 1985(3) would reach politically motivated conspiracies:

In the first place, it is a close question whether s. 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably

> Republicans. The central theme of the bill's proponents was that the Klan and others were forcibly resisting efforts to emancipate Negroes and give them equal access to political power. The predominant purpose of s. 1985(3) was to combat the prevalent animus against Negroes and their supporters. The latter included Republicans generally, as well as others, such as Northernors who came South with sympathetic views towards the

> Negro. Although we have examined with some care the legislative history that has been marshaled in support of the position that Congress meant to forbid wholly nonracial, but politically motivated conspiracies, we find difficult the question wherther s. 1985(3) provided a remedy for every concerted effort by one political group to nullify the influence of or do other injury to a competing group by use of otherwise unlawful means.

Scott, supra, 463 U.S. at 836. While ultimately withholding judgment on whether s. 1985(3) would reach politically motivated conspiracies, the Supreme Court refused to construe the section to reach "conspiracies motivated by bias towards others on account of their economic views, status or activities." Scott, supra, at 837 (emphasis in original).

In our decisions since Scott, we have recognized that the narrow construction given s. 1985(3) in that case renders of limited precedental value prior federal decisions taking an expansive view of the statute. See Buschi v. Kirven, 775 F.2d 1240, 1258 (4th Cir. 1985). In Harrison v.

KVAT Food Management, Inc., 766 F.2d 155 (4th Cir. 1985) this Court was presented with the question whether Republicans are a protected class within the meaning of s. 1985(3). As had the Supreme Court in Scott, we placed particular emphasis in addressing this question on the concerns which prompted passage of the Ku Klux Klan Act. We noted that the Act was passed "in response to widespread violence and acts of terror directed at blacks and their supporters in the postwar South," and that "the majority in Congress believed the provisions of the Act were necessary in order to compensate for the inability or unwillingness of southern governments and state judges to stem the tide of violence". Harrison, supra, at 157. Recognizing that the Supreme Court in Scott had, after a full review of the legislative history, exhibited "a noticeable lack of enthusiasm for expanding the coverage of s. 1985(3) to any classes

other than those expressly provided by the Court," we held that Congress had not intended to include Republicans within the scope of s. 1985(3). Harrison, supra, at 161. See also Grimes v. Smith, 776 F.2d 1359 (7th Cir. 1985) (s. 1985(3) does not reach nonracial political conspiracies).

In Buschi v. Kirven, supra, 775 F.2d at 1258, we reached the same conclusion with respect to "whistleblowers." In Buschi we stated:

> It is obvious that, whether we take the majority or the dissenting view in Scott, the class protected can extend no further than to those classes who are, so far as the enforcement of their rights is concerned, "in unprotected circumstances similar to those of the victims of Klan violence."

Id. (quoting Scott, supra at 851 (Blackmun, J., dissenting)). We held that "whistleblowers" could not be said to be "in unprotected circumstances" because a "whistleblower," like any other state employee, could seek protection from a discharge in retaliation for his exercise

of his rights of free speech.* Id. See also Trerice v. Summons, 755 F. 2d 1081 (4th Cir. 1985) (military prisoners are not class protected by s. 1985(3)); Wilhelm v. Continental Title Co., 720 F.2d 1173, 1177 (10th Cir. 1983), cert denied 465 U.S. 1103 (1984) (handicapped persons are not protected class under s. 1985(3).

Applying the Supreme Court's decision in Scott, the district court here found that animus against orphans is animus motivated by their economic status and is therefore outside the scope of s. 1985(3). We agree that, in light of the Supreme Court's decision in Scott and our own decisions in Harrison and Buschi, the animus allegedly motivating the conspiracy in this case does not implicate the protections of s. 1985(3) or the second half of s. 1985(2). While the loss of one or both parents deprives a child of the economic and other support provided by a natural parent, such a loss does not gen-

erate in others an invidiously discriminatory animus similar to that at which the Ku Klux Klan Act was aimed. Nor is an orphan left in unprotected circumstances similar to those of the victims of Klan violence. If only one parent has died and the other has not abandoned the child or been declared unfit, that parent is the natural guardian and protector of the child. See Va. Code s. 31.1. If both parents are dead, have abandoned the child, or have been declared unfit, the state, acting as parens patriae, protects the welfare of the child. Virginia, like other states, has enacted extensive legislation for the protection of children whose natural parents are unavailable to or unable to provide care and support, and has invested its social service departments with the authority to carry out the purposes of the legislation. See Va. Code tit. 16.1, Ch. 11; tit. 63.1, Chs. 10, 10.1, 11, 11.1 and 12.2. In view of the laws

protecting orphans and the absence of discriminatory animus similar to that faced by the victims of Klan violence, we conclude that orphans do not constitute a protected class within the meaning of s. 1985(3) or the second half of 1985(2).**

For the above reasons, we affirm the judgment of the district court denying relief under 42 U.S.C. s. 1985(2) and (3). Bloch's motions to supplement his appeal and file new evidence are denied. The appellees' motion for costs and attorney's fees is denied. We dispense with oral argument because the facts and legal contentions are fully developed in the materials before us, and argument would not aid significantly the decisional process.

AFFIRMED

* We also held that "whistleblowers" did not qualify as a class because they do not possess "characteristics comparable to those characterizing classes such as race, national origin, and sex." Buschi, supra

at 1258, (quoting Bellamy v. Mason's Stores, Inc., 368 F. Supp. 1025, 1028 (E. D. Va. 1973) aff'd, 508 F.2d 504 (4th Cir. 1974).

** This conclusion is not altered by the fact that Mountain Mission School is exempt from certain provisions governing other child caring institutions. Va. Code s. 63.1-218.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-2009

Daniel F. Bloch, Appellant

and

Johnny J. Dotson, Plaintiff

vs.

The Mountain Mission School, Inc., et al., Appellees

Appeal from the United States District Court for the Western District of Virginia at Big Stone Gap. Glen M. Williams, District Judge.

Upon consideration of the appellant's pro se petition for rehearing,

It is ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Russell with the concurrence of Judge Chapman and Judge Butzner.

For the Court,

John M. Greacen
Clerk

Dated June 5, 1986.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

Daniel Bloch,

Plaintiff

vs. C.A. 79-0125-B

Mountain Mission School, Inc., et al.,

Defendants

In accordance with a memorandum opinion entered this day, judgment is granted to defendants Judge Persin and Charles Sublett and this case is dismissed and stricken from the docket of this court.

The Clerk is directed to send certified copies of this Order to the plaintiff and counsel for the defendants.

ENTER: This 24th day of September 1985.

Glen M. Williams
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

Daniel Bloch,

Plaintiff

v. C.A. 79-0125-B

Mountain Mission School, Inc., et al.,

Defendants

By order entered on July 2, 1984, this court granted summary judgment to all defendants and all claims except the claim of conspiracy against Judge Nicholas E. Persin and Charles Sublett pursuant to the first portion of the second paragraph of 42 U.S.C. s. 1985. This claim alleges that Judge Persin and Sublett conspired to prevent Bloch from testifying in federal court in Ohio. Since plaintiff is proceeding pro se in this case, the court granted additional time for him to present evidence of a conspiracy between Judge Persin and Sublett. Such evidence has now been presented by affidavit and deposition.

Both defendants have renewed their motions for summary judgment.

Before addressing the summary judgment issues, the court must first address a motion to amend the complaint filed July 3, 1985. In the amendment, plaintiff seeks to have James M. Swiney added as a party defendant to his claim of conspiracy. The proposed amendment alleges that James M. Swiney intimidated one Harold Sykes from "telling the truth in federal court about what happened to me as a boy at the Mountain Mission School as part of a conspiracy to cover up child abuse there." This proposed amendment comes over six years after this suit was filed and at a time when depositions have been taken and the case submitted to the court for ruling. The court is mindful that leave should be "freely given" to amend. Fed. R. Civ. P. 15. However, it appears that this amendment relates to issues already disposed of by the court and is not shown to relate to

a conspiracy against Bloch. Further, it will, if granted, cause additional delay while the new defendant is served, answers the suit, and new evidence is taken in regard to his involvement. The court, in its discretion, overrules the motion to amend.

Because this court is of the opinion that Judge Persin was acting in a judicial capacity in a matter over which he had jurisdiction, he is absolutely immune from suit. Furthermore, the court is of the opinion that no facts have been presented to raise a factual issue as to whether or not a conspiracy existed between Judge Persin and Sublett. The court finds that both defendants are entitled to summary judgment.

JUDICIAL IMMUNITY

In an unpublished opinion of the United States Court of Appeals for the Fourth Circuit in this case dated October 18, 1982, the court said:

> The district court ruled that defendant Persin enjoyed absolute immunity from this suit. If the allegations against Persin, a state judge, are taken to be true...we think that this defendant acted in clear absence of all jurisdiction, so that judicial immunity would not apply. See Stump v. Sparkman, 435 U.S. 349 (1978).

This court ruled on a motion to dismiss at the time it held that Judge Persin was entitled to judicial immunity. Bloch's pleadings in his complaint state as follows:

> Later the same judge informed another attorney representing other Mountain Mission School students who wanted to file a civil suit against the orphanage that he would imprison Bloch if he so much as testified in that trial, which is obstruction of justice; that effectively quashed the trial, since Bloch was a key witness.

Because of these factors, the Court of Appeals went on to state: "the plaintiffs should be required to clarify their allegations. When this has been done, a number of summary dismissals may well be appropriate." This court now has before it the testimony of attorney Thomas O. Callaghan of Ohio, who had the conversation with

Judge Persin, Bloch's testimony, as well as Judge Persin's affidavits. The court is now in a position to rule on a motion for summary judgment. Under the facts as presented, the court is of the opinion that Judge Persin acted within his jurisdiction and is absolutely immune from suit for his acts.

The following are the material facts relating to Judge Persin. On or about May 29, 1975 in the Circuit Court of Buchanan County, Virginia, Bloch entered a plea of guilty to two counts of child abduction before Judge Nicholas Persin. The two children involved were attending Mountain Mission School at the time of their abduction. Bloch has attacked this conviction all the way to the United States Supreme Court. It remains at this time a valid criminal conviction. Judge Persin placed Bloch on probation one condition of which specified that Bloch could not associate with the two boys he had abducted nor with

any other students of the Mountain Mission School. According to attorney Thomas Callaghan (whose testimony is considered true for the purposes of this motion) in September or October 1977, Bloch told Callaghan he was on probation and one of the terms of probation was that he could not leave his home county, Sarasota, Florida. (This appears to be a general condition of probation, not a special condition of the court order.) Callaghan expressed concern that if Bloch came to Ohio, or become involved in a Mountain Mission suit "it could be a technical violation of your probation." (Callaghan Dep. p. 8). Callaghan called Judge Persin. He stated that he was "contemplating filing a lawsuit in behalf of certain residents of Mountain Mission School against Mountain Mission School," that Bloch would be a witness, and asked whether it would violate Bloch's probation if he were to "testify or participate in the case."

(Dep. p. 10). Callaghan quotes Judge Persin as stating "if Daniel Bloch has anything to do with Mountain Mission School legally or otherwise in a lawsuit outside of his home county, I will make sure that his probation is revoked and he goes to jail." (Dep. p. 10).

Callaghan further testified that he contemplated filing the suit in United States District Court, but he never filed the lawsuit. (Dep. pp. 10, 11). He further swore "I thought maybe it was better filed elsewhere it could have been filed in another district court." (Dep. p. 11).

In a letter dated December 2, 1977 Callaghan wrote to Bloch and in the second paragraph gave three reasons for not proceeding with the suit: (a) lack of total support of the parties, Bobby Watts, Johnny Dotson and Perry Parsons; (2) Virginia judge's "intransigence" on the probation order; and (3) the "voluntary" plea to the abduction charge.

A copy of the order of the Circuit Court of Buchanan County, Virginia in Case Number 113-74, dated September 29, 1975 is filed in this case as an exhibit to the affidavit of Judge Persin dated October 11, 1984. This order shows that a presentence report was filed by the probation officer and that Bloch was sentenced to ten years to run concurrently with a ten year sentence in Case No. 112-74. All except six months of this sentence was suspended and Bloch was placed on probation for ten years. There were three special conditions: (1) he was to file three psychiatric reports with the court every year (2) he was not to interfere with the operation of the Mountain Mission School in any way; and (3) he was not to contact, directly or indirectly, any of the children at the school. In Judge Persin's affidavit filed in this cause, he denies making any statement to Callaghan except to advise him of the terms of probation.

In Stump v. Sparkman, 435 U.S. at 359, the Supreme Court, in an unusual factual situation, upheld the time honored rule that a judge is entitled to judicial immunity so long as he had jurisdiction to act. Brady v. Fiske, 13 Wall 335 (1872). Indeed, even if a judge acts maliciously or corruptly, even if his acts deserve condemnation and are injurious to others, and even if palpably in excess of jurisdiction, he is still immune so long as he had jurisdiction. Randall v. Brigham, 7 Wall 523 (1869). In Stump, in an ex parte proceeding, Judge Stump ordered a fifteen year old girl to be sterilized. She was told that her appendix was being removed and did not know what had happened until two years later. The petition on which Judge Stump acted was never filed in his court. There was no statutory authority for his actions; case law in Indiana indicated common law disapproved of this action. When Judge Persin's actions are

placed alongside Judge Stump's, they pale by comparison.

In Hall v. Quillen, 631 F.2d 1154 (4th Cir. 1980), Judge Quillen allegedly committed to a mental hospital a young man who was not present. The judge also induced an attorney and a doctor to sign the commitment papers. The attorney signed as guardian ad litem and the doctor signed as a member of the hearing board. The judge was granted judicial immunity because he had jurisdiction to commit people to mental institutions.

In McAlester v. Brown, 490 F.2d 1280 (5th Cir. 1972) Judge Brown violated state and federal procedural requirements in regard to contempt citations. He was not in judicial robes; he was outside the courtroom. The court held that since the judge was visited in his official capacity, judicial immunity applied.

In the instant case, Judge Persin was in his office when he was called by an

attorney regarding a matter within his jurisdiction. Thus, what he said and did was as a judge in a matter involving official duties. If he was wrong, mistaken, malicious, vindictive or corrupt in his actions, he is still immune.

This court has had the opportunity to review the powers of circuit judges in Virginia on numerous occasions. Their awesome power almost boggles the mind. With regard to the powers, duties and responsibilities of judges over probation, this court reviewed them extensively in Rutherford v. Blankenship, 468 F.Supp. 1357 (W.D. Va. 1979).

It is to be noted that the general probation order in this case conditions the probation on "good behavior" in addition to the special provisions. A determination of good behavior, or revocation in general lies in the discretion of the trial court and that discretion is quite broad. Hamilton v. Commonwealth, 217 Va. 325, 228

S.E. 2d 555 (1976). Furthermore, there is no indication as to how the sufficiency of the cause of revocation is to be determined. Slayton v. Commonwealth, 185 Va. 357, 38 S.E.2d 479 (1946). The trial court has authority to revoke a suspended sentence for any cause deemed by it to be sufficient which occurs during the period of suspension. Hamilton, 228 S.E.2d at 557. Further, if the court fails to set a time limit, the court has jurisdiction for the maximum period for which the defendant could have been sentenced. In Dyve v. Commonwealth, 193 Va. 478, 69 S.E.2d 483 (1952) the court stated: "The court may, for any cause deemed by it sufficient...cause the defendant to be arrested and brought before the court..."

The most that can be argued against Judge Persin is that he abused his discretion (exceeded his jurisdiction) but he is still judicially immune.

CONSPIRACY

If one assumes that Judge Persin is not judicially immune, the court further finds that plaintiff has not presented sufficient evidence to create a factual issue justifying a trial on the issue of whether or not Judge Persin and Sublett conspired to violate the civil rights of Bloch by preventing him from testifying in a trial in Ohio as alleged in the complaint. Summary judgment shall be entered as a matter of law if there is no genuine issue as to any material fact. Fed. R. Civ. P. 56. Both Sublett and Judge Persin by affidavit deny that they entered into any conspiracy to prevent Bloch from testifying. There is nothing in the testimony of Callaghan or Bloch (other than conclusionary allegations) to point to any agreement between Judge Persin and Sublett either by direct or circumstantial evidence. Indeed, the only act alleged to be designed to prevent testimony is

the spontaneous act or response of Judge Persin to the questions of Callaghan.

Bloch argues that the testimony of Johnny Dotson raises a material issue of fact. The court notes that Dotson's evidence consists of an affidavit dated July 7, 1984 filed with his deposition, the deposition taken September 26, 1984 and another affidavit dated October 22, 1984. The court is concerned with the credibility of Dotson who admits that the affidavits he has filed are in part based on statements he has heard, that the affidavits are all prepared by Bloch, that he hates the Mountain Mission School, Judge Persin and Sublett, that he testified in 1975 against Bloch and later recanted his testimony, and that a magistrate in Ohio found that he lied concerning his mother. Also, most importantly, there are variances in the affidavits which would lead a reasonable mind to conclude that the affidavits were slanted

to suit the purpose at the time. For example, in the affidavit of July 7, 1984, Dotson states "I had been going around repeating James Swiney's claim that they 'owned' Judge Persin" while in the October 22, 1984 affidavit, Dotson states, referring to Sublett and Swiney, "They said no one would believe us, that they 'owned' Judge Persin."

Giving full credence to Dotson, as the court must in ruling on this motion, he states that in May 1975 when he was thirteen years old, he was taken by Sublett to Judge Persin's office and was told that if he testified in Roanoke and Abingdon, he would be put in reform school when he got back. This alleged incident occurred before Bloch was tried in Buchanan County, Virginia regarding matters unrelated to Bloch. At the most, this creates a cause of action for violating the civil rights of Dotson. It is in no way connected to any agreement, plan or scheme against

Bloch in 1977 in Ohio.

After reviewing the evidence presented by the massive volumes contained in this file, the court is of the opinion that no facts are presented as to a conspiracy between Sublett and Judge Persin to prevent Bloch from testifying in federal court in Ohio.

An Order will be entered granting summary judgment to defendants Sublett and Judge Persin.

ENTER: This 24 day of September, 1985.

Glen M. Williams
UNITED STATES DISTRICT JUDGE

NO. 86-429

FILED
SEP 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

JOHNNY J. DOTSON and
DANIEL FINN BLOCH,

Petitioners

v.

THE MOUNTAIN MISSION SCHOOL, INC., ET AL,

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is Dotson a proper party to this proceeding?

2. Has Bloch stated a claim of damage or shown evidence of injury sufficient to support this Petition?

3. Having previously denied a Petition for a Writ of Certiorari attacking the constitutionality of Section 63.1-218 of the 1950 Code of Virginia, as amended, should the Court consider yet another Petition made by the same petitioner in the same proceeding?

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STATEMENT OF THE CASE

The petitioner, Daniel Finn Bloch, was convicted in 1978 for the felonious abduction of two children from the Mountain Mission School. Upon return after their abduction, the two infant boys related that they had also been sexually molested by Bloch. Investigation revealed that although Mr. Bloch had been charged previously with sexual crimes against minor boys, the charges were not prosecuted to their conclusion. However, the abduction of the two boys from Mountain Mission School was prosecuted, and Mr. Bloch pleaded guilty. After pleading guilty to the felony charges and serving his jail sentence, the petitioner embarked upon a course of conduct which, by his own admission, was intended to do nothing more than punish the Mountain Mission School, the party whom he held responsible for his felony convictions.

In pursuing his vendetta against the Mountain Mission School, and all persons connected with it, Mr. Bloch has instituted suit in his own name, as well as in the names of any other individuals who may be willing to participate in his scheme for revenge. Mr. Bloch, although not an attorney licensed to practice in any of the fifty states, apparently prepares all the pleadings in all of the suits filed against the School as well as all the affidavits submitted to the various courts, and serves as custodian for all of the "evidence" which he alleges supports his claims against the School.

Having failed to overturn his conviction through his habeas corpus petitions, Bloch now contents himself to sue all judges, public officials, commonwealth attorneys, FBI officials, and all manner of public and private citizens whom he considers to be involved in the entry of

the Order of Conviction based upon his plea of guilty to the felony charges. To do this, Bloch alleges a conspiracy which he has been unable to support by even the slightest scintilla of competent evidence before any judicial tribunal, state or federal, and proceeds to list as a defendant each individual, judge or governmental official who fails to join his crusade for revenge. In this fashion, the petitioner continues to use the courts as a sounding board for advancing his otherwise slanderous and libelous statements. To further his cause, while insulating himself from tort action, Bloch forwards his pleadings to the news media with the representation that the distortions and fabrications contained therein constitute "evidence" supporting his various claims.

On appeal from an initial summary dismissal by the Federal District Court in

September, 1979, the U. S. Fourth Circuit Court of Appeals, after affirming a large portion of the Order of summary dismissal, remanded this matter to the Federal District Court for the Western District of Virginia with specific instructions that the plaintiff be given every reasonable opportunity to present all credible and competent evidence to support his allegations. Unable to supply any evidence to support his contentions, the Federal District Court again dismissed this suit, with said dismissal being affirmed by the Fourth Circuit Court of Appeals by Order and Memorandum Opinion dated May 2, 1986. This Petition then is from the June 5, 1986, Order denying the Petition for Rehearing.

ARGUMENT

I

PETITIONER DOTSON IS NOT A PROPER PARTY TO THESE PROCEEDINGS.

By Order of the Federal District Court for the Western District of Virginia, Johnny Dotson was dismissed as a petitioner in this suit. On appeal, this dismissal was affirmed by the Fourth Circuit Court of Appeals [Dotson v. Mountain Mission School, No. 79-1771 (4th Cir., Oct. 18, 1982) (unpublished), Slip op. at 23] wherein that Court held "the entire complaint on behalf of Dotson against the defendants . . . was properly dismissed for the reasons we have expressed." On October 27, 1982, a Petition for Rehearing was filed with the Fourth Circuit Court of Appeals, with said rehearing being denied by Order dated November 12, 1982. On December 15, 1982,

a Notice of Intent to Seek Further Appellate Review was filed with the Clerk of the Fourth Circuit Court of Appeals indicating the intent to petition this Court for a petition for writ of certiorari. In that proceeding, the petitioners herein did not proceed pro se, but were represented by counsel of record throughout all stages of the appeal.

The Petition for Certiorari, which specifically raised the issue as to whether or not Dotson was a proper party to this proceeding, was denied by Order of this Court dated March 21, 1983. Accordingly, all appeals having been exhausted, the Order dismissing Dotson as a party to this proceeding is final and Bloch should be precluded from rearguing this issue again on subsequent appeal in the same case.

Even if Dotson had not been dismissed from this proceeding by final order of the

Court, he has not petitioned this Court and by failing to petition this Court for certiorari within the time permitted by the Rules of this Court, he is no longer a party herein, and the Order of the Fourth Circuit Court of Appeals is final in all respects as to him. The pro se Petition filed by Bloch alone, does not thereby serve to make Dotson a proper party in these appellate proceedings.

II

PETITIONER BLOCH HAS FAILED TO STATE A CLAIM AND PRESENT EVIDENCE OF DAMAGE SUFFICIENT TO SUPPORT HIS PETITION FOR THIS WRIT.

Rule 21.1(a) of the Supreme Court Rules applicable to the Petition for a Writ of Certiorari states specifically that "only the questions set forth in the Petition or fairly included therein will be considered by the Court." Accordingly, there are only three questions presented by the appellants for review in support of

their Petition. These issues will be addressed in the order presented by the petitioner for review.

The petitioner first asks the Court to create a new "class" of individuals whom he alleges were the victims of a discriminatory animus. However, notwithstanding his interest to participate in this "landmark" determination, Bloch has been wholly unable to sustain even the most minimum burden of proof to survive the previous Motions to Dismiss. Only three months after this suit was filed, the Court by Order and Memorandum Opinion summarily dismissed the Complaint against all defendants. On appeal, the Fourth Circuit Court of Appeals affirmed the District Court's dismissal of eight issues, but also stated that

> Given that pro se pleadings must be read liberally, we think that the plaintiffs must be afforded the opportunity to develop a claim under both halves of Section 1985(2) and under Section

> 1985(3) on remand in the district court if the other prerequisites for a suit under these provisions are present . . . [I]t is true that the text of the Complaint fails even to mention many of the named defendants. There are many serious allegations, however in which the actor is not named. Since pro se complaints must be read liberally, we think that it was premature to dismiss defendants on this basis at this stage of the proceedings. A number of the defendants objected to the vagueness of the Complaint and demanded strict proof. Instead of outright dismissal, the plaintiffs should be required to clarify their allegations. When this has been done, a number of summary dismissals may well be appropriate. (Dotson, supra, Slip op. at 12 and 19-20.)

Upon remand, after repeated opportunities and extended time periods within which to submit evidence by deposition, affidavit or otherwise, the plaintiff was unable to present any competent evidence to support his claims under both halves of Section 1985(2) and under Section 1985(3), even after having been admonished by the Court to do so or suffer another dismissal. Accordingly, after affording Bloch this

opportunity on remand, the District Court again entered judgment for the defendants. On appeal, the Fourth Circuit Court of Appeals, in reference to the allegations under the first half of Section 1985(2) stated that

> The District Court found that Bloch's conclusory allegations of a conspiracy between Persin and Sublett were insufficient to create a genuine issue of material fact on the existence of a conspiracy to prevent Bloch from testifying in Federal Court. We agree. (Page 6.) (Dotson v. Mountain Mission School, No. 85-2009 (4th Cir. May 2, 1986) Slip op. at 6.)

In responding to the allegations of injury under the second half of Section 1985(2) and Section 1985(3) the Fourth Circuit held that

> Applying the Supreme Court's decision in Scott, the district court here found that animus against orphans is animus motivated by their economic status and is therefore outside the scope of Section 1985(3). We agree that, in light of the Supreme Court's decision in Scott and our decisions in Harrison and Buschi, the animus allegedly motivating the conspiracy in this

> case does not implicate the protections of Section 1985(3) or the second half of Section 1985(2) . . . . In view of the laws protecting orphans in the absence of discriminatory animus similar to that faced by the victims of Klan violence, we conclude that orphans do not constitute a protected class within the meaning of Section 1985(3) or the second half of Section 1985(2). [Citations omitted.] (Dotson, supra, No. 85-2009, Slip op. at 12-13.)

Accordingly, the Fourth Circuit Court of Appeals, in May of 1986, reached the same conclusions that were reached by the Federal District Court in September of 1979. That conclusion is that, no matter how "novel" the issues are which Bloch seeks to present to the Court, he has been wholly unable to support his bare and conclusory allegations with any competent or credible evidence which would permit further inquiry.

The second question presented for review set forth in the Petition is "do overt acts of a conspiracy over a period

of years connect the conspirators?" Appellees do not contest this general statement which apparently is intended to mean that conspirators may be connected to a conspiracy through their overt acts undertaken in furtherance of the conspiracy, or its aims. However, this "question" does not present anything before this Court that needs to be "reviewed" on appeal.

As a pro se plaintiff, Bloch has been given every reasonable opportunity to present competent evidence that the conspiracy he alleges actually exists. Without first proving that a conspiracy exists, it is impossible to proceed against "conspirators", or connect unrelated individuals to it.

Question number three is merely an attempt to relitigate the final order of the Federal District Court as affirmed by the Fourth Circuit Court of Appeals and

arguably reaffirmed by this Court through the denial of the previously requested Writ of Certiorari. All Courts have, by final order, found Section 63.1-218 of the 1950 Code of Virginia, as amended, constitutional. The prior resolution of the appeals on that issue in favor of the statute as discussed in more detail infra, should preclude any further argument against the constitutionality of this statute.

III

HAVING ONCE BEEN DENIED A PETITION FOR A WRIT OF CERTIORARI ON THEIR ATTACKS OF SECTION 63.1-218 OF THE 1950 CODE OF VIRGINIA, AS AMENDED, IN THIS SAME CASE, THE COURT SHOULD NOT CONSIDER A SUBSEQUENT PETITION MADE BY THE SAME PETITIONERS CHALLENGING THE SAME STATUTE IN THE SAME CASE.

The petitioner herein challenged the constitutionality of Virginia Code Section 63.1-218 of the 1950 Code of Virginia, as

amended, in his original complaint filed in the Federal District Court for the Western District of Virginia. However, in Paragraph 6 of said Complaint, Bloch alleges only that Petitioner Dotson suffered injuries as a consequence of that statute. Bloch was never a student at the Mountain Mission School, nor is it anywhere alleged that he is an orphan or a member of the "class" of orphans which he asks this Court to create. Furthermore, there has been no showing that Bloch has ever been a student at, or resident of, or had any other connection with any other private school or charitable institution which may be affected by Virginia Code Section 63.1-218. Accordingly, Bloch would have no standing in his own right to challenge the constitutionality of the statute before this Court, and as noted above Dotson is not a proper party to this proceeding by virtue of both his dismissal

by prior final order of the Court, and by his failure to join in this Petition for a Writ of Certiorari and is, therefore, not before the Court as a petitioner.

In addition to the asserted lack of standing and Dotson's subsequent dismissal as a party to this suit, the constitutionality of the Virginia Code Section in question has been fully litigated by these parties and has been resolved by final order. By Order of the United States District Court for the Western District of Virginia dated September 19, 1979, and subsequent Memorandum Opinion dated November 2, 1979, all allegations and complaints raised by the Petitioners were dismissed. Petitioners then filed a Motion for Reconsideration before the Federal District Court, and at the same time, filed a Notice of Appeal to the Fourth Circuit Court of Appeals. By Order

and Memorandum Opinion of the Circuit Court dated October 18, 1982, the Court upheld the constitutionality of the Virginia Code Section in question noting that although the plaintiffs had failed to join proper party defendants to challenge the statute, they found the statute to be constitutional. Accordingly, the District Court's dismissal of the challenge to the constitutionality of the Virginia statute 63.1-218 was affirmed on appeal by the Fourth Circuit Court of Appeals.

A Motion for Consideration was subsequently filed by the Petitioners, and denied by the Court of Appeals, and a Petition for a Writ of Certiorari was then sought and denied by this Court on March 21, 1983. This is the same proceeding between these parties, and the Court has previously refused a Writ of Certiorari on this issue.

CONCLUSION

Because of his pro se status, the lower courts have granted opportunity upon opportunity to the appellant to support his bare and conclusory allegations that were set forth in his Complaint filed back in June of 1979. This case has been once remanded by the Fourth Circuit Court of Appeals to allow the appellant to submit some competent or credible evidence to substantiate his claims. This the appellant was unable to do. The conclusion then is not that the petitioner presents a "new" or "novel" theory of recovery which should be determined by this Court, but rather that, even if the Court should adopt the petitioner's construction of Section 1983 and 1985, he has not been able to produce any evidence to substantiate his claims.

The record below is as clear as it is voluminous and shows that the appellant

desires only to use these proceedings as a "safe harbor" from which to slander the School through his libelous pleadings. Mr. Bloch should not be awarded additional opportunity to abuse the judicial process in his vendetta against the Mountain Mission School by using the courts as a forum in which to attack the School, and all those connected with it, with impunity. Accordingly, for the reasons stated herein, and for those cited by both the Fourth Circuit Court of Appeals and the Federal District Court for the Western District of Virginia, appellants respectfully request that the Petition for a Writ of Certiorari be denied, and that they be awarded their costs in this proceeding.

Respectfully submitted,

THE MOUNTAIN MISSION
SCHOOL, INC.,
CHARLES SUBLETT,
JAMES SWINEY,

MRS. JAMES SWINEY,
BERNIECE SUBLETT,
PAUL PLATT,
MABEL ABBOTT,
JIM STANLEY,
MINNIE GRANNERT,
DR. THOMAS D. McDONALD,
DR. J. P. SUTHERLAND,
FRED SHORT,
HERMAN WELLS,
CLARENCE GREENLEAF,
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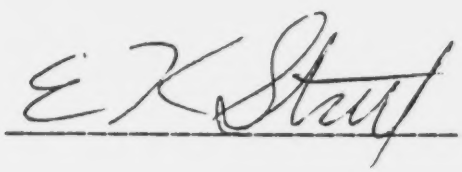
CERTIFICATE

I hereby certify that forty copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were filed with the Clerk of the Supreme Court of the United States and three copies were mailed,

postage prepaid, to Daniel F. Bloch, petitioner pro se, 110 Pearl Avenue, Sarasota, FL 34234; Linwood T. Wells, Jr., Esq., 101 N. 8th Street, Richmond, VA 23219; Birg Sergent, Esq., P. O. Box 426, Pennington Gap, VA 24277; E. Montgomery Tucker, P. O. Box 1709, Roanoke, VA 24008; James P. Jones, Esq., P. O. Box 2009, Bristol, VA 24203; Mr. & Mrs. Charles Lambert, 104 River Road, Ellwood City, PA 16117; Edward Sawyer, P. O. Box 630306, Ojus, FL 33163; Robert B. Hines, 101 S. Washington Ave., Millersburg, OH 44654; Gene W. Holliker, State Office Tower, 30th Floor, 30 E. Broad Street, Columbus, OH 43215; and Roger Makley, IBM Bldg., Dayton, OH 45401, on this 19th day of September, 1986.



86-429

FILED
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JOSEPH F. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

JOHNNY J. DOTSON

and

DANIEL FINN BLOCH

PETITIONERS

v.

MOUNTAIN MISSION SCHOOL, INC., et al.,

RESPONDENTS

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

REPLY BRIEF

DANIEL FINN BLOCH

PETITIONER pro se

110 Pearl Avenue

Sarasota, Florida 34243

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3 PP

PETITIONER'S REPLY BRIEF

Pursuant to Rules 34.1(c) and 34.6 of the Supreme Court Rules, respondent Mountain Mission School's Brief in Opposition should be stricken because:

1. There is no table of authorities
2. No citations are listed in support of respondent's argument
3. Respondents offer no argument in opposition to the class question raised by petitioner
4. Denial of an interlocutory petition for a writ of certiorari is not a ground to reject the present petition.
5. Respondents bring up irrelevant, scandalous matter from which petitioner Bloch was completely exonerated 25 years ago.

Wherefore respondents' Brief in Opposition should be stricken by the Court.

CERTIFICATE OF SERVICE

I certify that 40 copies of the foregoing were filed with the Clerk of the Supreme Court of the United States and 3 copies mailed to E. K. Street, P.O. Box 2100, Grundy, VA 24614; Linwood T. Wells, Jr., 101 N. 8th St., Richmond, VA 23219; Birg Sergent, P.O. Box 426, Pennington Gap, VA 24277; E. Montgomery Tucker, P.O. Box 1709, Roanoke, VA 24008; James P. Jones, P.O. Box 2009, Bristol, VA 24203; Mr. & Mrs. Charles R. Lambert, 104 River Rd., Ellwood City, PA 16117; Edward C. Sawyer, P.O. Box 630306, Ojus, FL 33163; Robert B. Hines, 101 S. Washington Ave., Millersburg, OH 44654; Gene W. Holliker, State Office Tower, 30th Floor, 30 E. Broad St., Columbus, OH 43215; & Roger Makley, IBM Building, Dayton, OH 45401 on this 30th day of September 1986.

Daniel F. Bloch